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CHARLES FLEMING

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 276

JOHN GONZALES and JOHN CHIE-
ROTTI,

Petitioners,

vs.

THE PEOPLE OF THE STATE OF
CALIFORNIA,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. SUMMARY OF PROCEEDINGS

Petitioners have filed with this Court their petition for a writ of certiorari to the Supreme Court of the State of California to annul judgments of conviction of felony entered against them in the Superior Court of the State of California, in and for the City and County of San Francisco, and affirmed by said Supreme Court.* The asserted

* The Opinion of the Supreme Court of California is reported in 20 Advance California Reports at pages 158 and 353 and 124 Pacific Reporter, Second Series, at page 44.

ground for annulling said judgments is that petitioners were denied due process of law in the proceedings leading up to said judgments by the receipt therein of certain physical evidence secured from the apartment of petitioner Chierotti and testimony of the police officers taking this evidence respecting the same, where entrance to the apartment of petitioner Chierotti was accomplished without a search warrant and without the consent of any person, save the clerk and janitor of the apartment house in which Chierotti resided, who let the officers into said apartment.

II. THE QUESTION PRESENTED

Petitioners' contentions are variously stated, but a reading of the petition and brief appended thereto demonstrates that the sole question presented by these proceedings is whether the receipt in evidence in a prosecution in a State court of certain paraphernalia taken by subordinate police officers from the apartment of a defendant in the proceeding without a warrant, and the receipt of testimony respecting the taking of such paraphernalia, constitute a denial of the due process of law required by Article Fourteen of Amendments to the Constitution of the United States.

We shall demonstrate that no substantial federal question is presented in this proceeding.

III. STATEMENT OF THE CASE

The facts referred to in petitioners' statement of the case, pages 2 through 7, and in their statement of facts, pages 38 through 41, are not disputed, but we do not accede to a number of the argumentative statements contained in these portions of the petition and brief, and for that reason state the ultimate facts we deem necessary to determination herein.

For the purposes of this proceeding, it may be assumed that two police officers of the City and County of San Francisco, State of California, entered the residential apartment of petitioner Chierotti after the door to the same was opened by the janitor of the apartment house, at the request of the clerk in charge thereof, without the consent of petitioner Chierotti, and without any warrant, writ or process of any court, and without the consent of petitioner Chierotti (pp. 18 and 19 of the Petition herein); that upon entrance to petitioner Chierotti's said apartment, the police officers observed and took possession of a certain black bag and its contents subsequently introduced in evidence in the trial of petitioners; that petitioners, assuming their right to so object, offered timely and appropriate objections to the introduction of said physical evidence, and all testimony respecting the same and the entrance into Chierotti's apartment and that petitioner Chierotti, assuming his right so to do, made timely and appropriate demand for the suppression and return of this physical evidence; and

that petitioners have exhausted their remedies respecting these matters in the courts of California.

It is established, also, that petitioner Chierotti stated to the arresting officers at the time of his arrest that he resided at an address other than that entered and searched by the police officers. (Reporter's Transcript on Appeal, p. 101, lines 13-19.)*

IV. ARGUMENT

A. Introductory

The Constitution of the State of California, Article I, Section 19, provides:

“The right of the people to be secure in their persons, houses, papers and effects, against unreasonable seizures and searches, shall not be violated; and no warrant shall issue but on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the person and things to be seized.”

The foregoing provision of the Constitution of the State of California has been interpreted by the courts of California as not preventing the introduction in evidence in criminal proceedings in the courts of California of evidence seized in violation of the constitutional provision and statutes of the State enacted in furtherance thereof.

People v. Mayen, 188 Cal. 237, 205 Pac. 435;

People v. Gonzales, 20 A. C. 158 and 353; 124 Pac. (2) 44, and cases cited.

* The Attorney General has not been furnished a copy of either the type-written or printed record.

The doctrine of these cases is the specific application of the common law rule that competent and admissible evidence will be admitted without inquiry as to its source or the manner in which it was obtained.

People v. Alden, 113 Cal. 264, 45 Pac. 327;
Olmstead v. U. S., 277 U. S. 438 at 463 and 467,
48 S. Ct. 564;
Wigmore on Evidence (Third Edition) 1940,
Section 2183.

It must be taken as conceded that the individual states may, by statute or judicial declaration of its common law, determine the rules of evidence to be followed in their courts subject only to the limitation that such rules of evidence may not be so applied as to deprive an accused of a fair trial and the due process contemplated by the Fourteenth Article of Amendment to the Constitution of the United States.

Olmstead v. U. S., *supra*;
Fong Y. Ting v. U. S., 149 U. S. 698 at 729,
13 S. Ct. 1016;
Adams v. New York, 192 U. S. 585, 24 S. Ct.
372.

B. Article Four of Amendments to the Constitution of the United States does not apply to the State of California

It appears conceded by petitioners that Article Four of Amendments to the Constitution of the United States, as interpreted by this Court, does

not apply to the states. This is certainly the holding of the authorities.

Weeks v. United States, 232 U. S. 383, 34 S. Ct. 341;

Palko v. Connecticut, 302 U. S. 319, at 323, 327, 58 S. Ct. 149;

Burdeau v. McDowell, 256 U. S. 465, 41 S. Ct. 574.

This rule extends to proceedings in the courts of the United States and evidence seized by State officers without a warrant is admissible in proceedings of the courts of the United States.

Weeks v. United States, *supra*;

Burdeau v. McDowell, *supra*;

Center v. United States, 267 U. S. 575, 45 S. Ct. 230.

C. Article Fourteen of Amendments to the Constitution of the United States does not apply

1. Article Fourteen of Amendments to the Constitution of the United States does not by its terms, or in effect, impose upon the individual states the limitations upon the United States contained in Articles One to Eight of Amendments

Palko v. Connecticut, *supra*;

Snyder v. Massachusetts, 291 U. S. 97, 54 S. Ct. 330;

Twining v. New Jersey, 211 U. S. 78, 29 S. Ct. 14.

See, also:

Charles Warren "The New Liberty Under the Fourteenth Amendment," 39 Harvard Law Review, 431;

Edwin S. Corwin "The Doctrine of Due Process Before the Civil War." 24 Harvard Law Review, 366.

2. There was no denial of due process by the admission and consideration of the seized evidence

Neither reason nor authority supports petitioners' contention that their conviction was without the due process guaranteed to them by the Constitution of the United States. As the Supreme Court of California points out in its opinion herein, assuming that the unlawful entry and seizure of evidence should be held to constitute a denial of due process, it does not follow that the receipt of such seized evidence in a judicial proceeding deprives the litigants of due process. The opinion reads in part (p. 163):

"The use of evidence obtained through an illegal search and seizure, however, does not violate due process of law for it does not affect the fairness or impartiality of the trial. (*People v. Defore*, 242 N. Y. 13 (150 N. E. 585); *People v. Mayen*, *supra*; *Com. v. Donnelly*, 246 Mass. 507 (141 N. E. 500); *Johnson v. State*, 152 Ga. 271 (109 S. E. 662, 19 A. L. R. 641).) The fact that an officer acted improperly in obtaining evidence presented at the trial in no way precludes the court from rendering a fair and impartial judg-

ment. It has long been an established rule of evidence that 'the admissibility of evidence is not affected by the illegality of the means through which the party has been enabled to obtain the evidence.' (8 Wigmore, Evidence, (3rd. ed.) sec. 2183, p. 5, and cases there cited.)''

It appears conceded, as it must be, that no case has ever determined that the introduction of genuine and competent evidence, however obtained, constitutes a denial of due process as contemplated by Article Fourteen of Amendments.

In the decisions of this Court cited by petitioners, altogether different questions were presented. In each of them the invasion of the rights of the persons undergoing prosecution operated directly upon the evidence or the proceeding itself. Here any deprivation of right or privilege of which petitioner Chierotti may complain occurred before the inception and entirely outside of the judicial proceeding. The probative effect of the evidence introduced was not affected by the means by which it came to court. The evidence was not *created* in whole or in part by the action of the police officers.

This Court has held that evidence unlawfully seized by State officers and other persons may, nevertheless, be received in a federal prosecution when the federal officers do not participate in the improper seizure.

Weeks v. United States, supra;

Burdeau v. McDowell, supra;

Center v. United States, supra.

If petitioners' contention were tenable, it is obvious that one from whom evidence is taken without warrant is deprived of a fair hearing and due process of law to the same extent when the evidence is received by the courts of the United States as he is when it is received in the courts of the states.

The basis of the exclusionary doctrine of the United States courts is their interpretation of the Fourth Amendment. Since the Constitution, statutes and common law of California do not require a similar holding, and the evidence was admissible though seized without a warrant, petitioners were fairly tried according to law.

3. The question presented has been determined by this Court

In the case of *McIntyre v. State*, 190 Ga. 872, 11 S. E. (2d) 5, 312 U. S. 695, 61 S. Ct. 732, this Court, on March 3, 1941, denied, without opinion, a petition for writ of certiorari to the Supreme Court of the State of Georgia, which had, on September 24, 1940, affirmed a judgment of conviction in a trial court in the State of Georgia in a proceeding in which evidence seized from the person and automobile of the defendant by State officers, without a warrant, was received in evidence over the objection of the defendant that the receipt of such evidence contravened the provisions of the Fourteenth Article of Amendment.

The opinion of the Supreme Court of Georgia upon this question reads in part:

“Only the constitutional questions relating to admissibility in evidence of articles introduced for the purpose of showing that the defendant was engaged in operating a lottery, which articles were taken from him and his automobile by State officers without a warrant, and the admissibility of oral testimony relating to such articles, require elaboration. It is alleged that all such evidence was illegal as in contravention of the Federal and State constitutions. The defendant contends that the admission of this evidence . . . violated the ‘due process of law’ provision in the 14th amendment of the United States constitution.”

* * *

“We turn now to the question whether the admission of the alleged lottery evidence violated the ‘due process of law’ clause of the 14th Federal amendment. . . .

* * *

“Accordingly, irrespective of the correctness or incorrectness of the questioned rule of evidence as held in cases of this court based upon earlier decisions both of the United States Supreme Court and this court, or the rule as held in other cases of the United States Supreme Court with regard to the admissibility of such evidence when obtained by *Federal* officers and offered in *Federal* trials, under no view would such a rule of evidence and procedure in a State court constitute a violation of the ‘due process’ afforded by the 14th Federal amendment.”

(11 Southeastern Reporter, (2d), pp. 8, 9 and 11.)

The proceedings in the Georgia courts in this case were identical with those in this proceeding, and the denial of the petition in that case is a direct precedent for the denial of the petition in this case.

V. CONCLUSION

We respectfully submit that no substantial federal question is presented by the record in this proceeding; that no invasion of petitioners' rights was committed by the courts of California and that the petition for writ of certiorari should be denied.

Dated: August 18, 1942.

Respectfully submitted.

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J. ALBERT HUTCHINSON,

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